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16  
 17 **UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF WASHINGTON**

18 CITY OF SPOKANE, a municipal  
 corporation, located in the County of  
 19 Spokane, State of Washington,

20 Plaintiff,

21 v.

22 MONSANTO COMPANY, SOLUTIA  
 INC., and PHARMACIA  
 23 CORPORATION, and DOES 1 - 100,

24 Defendants.

Case No. 15-cv-00201-SMJ

**DEFENDANTS' REPLY BRIEF IN  
 SUPPORT OF THEIR DAUBERT  
 MOTION TO EXCLUDE EXPERT  
 TESTIMONY OF LISA RODENBURG**

Hearing Date: March 12, 2020  
 Time: 8:30 a.m.  
 Location: Richland, WA

With Oral Argument

1 **I. INTRODUCTION**

2 Plaintiff glosses over the numerous data and methodological flaws identified  
3 in Defendants’ motion by summarily arguing that, at most, those sources of  
4 unreliability are “proper issue[s] for cross examination, not a sufficient basis for  
5 exclusion” of Rodenburg’s testimony. ECF No. 496 at 4, 9. In so arguing, Plaintiff  
6 attempts to distance itself from clear, binding deposition admissions establishing  
7 that Rodenburg failed to engage in “sound science” and employed a scientifically  
8 indefensible methodology in reaching conclusions that are diametrically opposed  
9 to those she previously presented at Rutgers University before she was retained in  
10 this case. As discussed herein, Rodenburg’s reliance on unreliable data, and  
11 unfounded “take my word for it” methodology, flunks the *Daubert* inquiry.

12 **II. ARGUMENT**

13 **A. The Data Underlying Rodenburg’s Opinions are Unreliable**

14 Rodenburg admits that she cannot vouch for the representativeness of the  
15 sampling data that she reviewed. ECF No. 503-1 at 513 (103:19–104:3)  
16 (Rodenburg cannot say whether the data was “representative of the entire river for  
17 12 months out of the year”); *Id.* (105:13-24) (Rodenburg “did not look at” whether  
18 PCB concentrations and congener patterns in the Spokane River or County of  
19 Spokane wastewater treatment system were materially different during high versus  
20 low flow seasons). Nevertheless, and despite these clear admissions, Plaintiff  
21 baldly asserts that Rodenburg “was able to determine that the surface water data  
22 was representative of the entire range of typical flow conditions in the Spokane  
23 River” and “was aware that the surface water data was representative of the River  
24 spatially and in terms of river flow.” ECF No. 496 at 4. Rodenburg’s admissions

1 belie Plaintiff's argument, and her inability to vouch for the representativeness of  
2 the data she reviewed precludes Rodenburg from making river-wide  
3 pronouncements on Aroclor versus byproduct PCB concentrations. Fed. R. Evid.  
4 702; *Waskowski v. State Farm*, 970 F. Supp. 2d 714, 723 (E.D. Mich. 2013).

5 Tellingly, Plaintiff does not address Rodenburg's failure to verify that proper  
6 QA/QC measures were followed by the sampling labs, despite Rodenburg's  
7 admission that, without appropriate QA/QC, it is impossible to determine whether  
8 data is valid. ECF No. 503-1 at 512 (95:23–96:4). Rather than verify that proper  
9 QA/QC measures were adhered to, Rodenburg testified that she simply "assume[d]  
10 that the data is valid" because it was downloaded from a state database. *Id.* (95:7–  
11 96:17). Rodenburg admits that she did not review any of the QA/QC manuals,  
12 guidelines, protocols, logbooks, chain of custody records, equipment maintenance  
13 records, source and certification standards, formulae or algorithms that were  
14 employed, if any, by the labs. ECF No. 403-1 at 98-100 (92:4-23, 95:23–96:4); *see*  
15 *also* Declaration of David. S. Haase ("Haase Decl."), Ex. 10 at 93-94.

16 In addition to QA/QC, blank correction is necessary to ensure that PCBs  
17 found in samples are not derived from lab or field contamination. ECF No. 403-1  
18 at 125 (173:17-24).<sup>1</sup> Plaintiff claims that Rodenburg "did an extensive review of  
19 blank correction procedures for the surface water data and other studies that she

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21 <sup>1</sup> Rodenburg recently reported that blank concentrations (88 pg/L) accounted for  
22 more than 50% of sampling data concentrations (171 pg/L) in the Spokane River.  
23 *See* Haase Decl., Ex. 11 (Rodenburg, *et al.* (2020)).  
24

1 relied upon.” ECF No. 496 at 4. Yet, during her deposition, Rodenburg was unable  
 2 to identify which methods of blank correction, if any, were used for 13 of the 16  
 3 (81.3%) environmental compartments from which sampling data were reviewed.  
 4 ECF No. 403-1 at 4-5; ECF No. 503-1 at 517 (186:20–187:5).<sup>2</sup> She also admittedly  
 5 failed to conduct blank correction on any of the “B” flagged<sup>3</sup> municipal product  
 6 data, in contravention of laboratory protocol. ECF No. 403-1 at 185-92 (265:11–  
 7 272:4). Regarding “N” flagged data, Plaintiff claims that such data “may be treated  
 8 as a detection” of PCBs (ECF No. 496 at 5) despite laboratory protocol explicitly  
 9 stating that an “N” flag signifies “not detected due to incorrect ion ratio.” Haase  
 10 Decl., Ex. 12 at 5; ECF No. 403-1 at 192 (272:5-9) (Rodenburg testified that,  
 11 “according to this, an ‘N’ is not detected due to incorrect ratio”).

12 Rodenburg’s reliance on “B” and “N” flagged data resulted in her reporting  
 13 the presence of Aroclor 1242 in a pesticide (weedard 64 (2,4-D)) in which the City  
 14 of Spokane reported the presence of virtually no PCBs. *See* Haase Decl., Ex. 10 at  
 15 277:17–279:21; ECF No. 427-2 at 45-46. Rodenburg also reported that “[t]he  
 16

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17 <sup>2</sup> In her most recent publication, Rodenburg recommends that blank correction be  
 18 performed on “all data sets.” Haase Decl., Ex. 11 at 110 (Rodenburg, *et al.* (2020)).

19 <sup>3</sup> A “B” flag signifies that an associated blank sample has also detected the  
 20 particular congener. ECF No. 403-1 at 185 (265:11-14). In its own analysis of the  
 21 same data, the City of Spokane “removed [‘B’ flagged] data from the total PCB  
 22 value.” *Id.* at 189 (269:15–270:2); ECF No. 427-2 at 8. Rodenburg admits that she  
 23 did not do this. ECF No. 403-1 at 189-90 (269:15–270:2).  
 24

1 highest  $R^2$  values for the MLR were found for [products including] CIPP (cured in  
2 place piping) (0.64))” (ECF No. 403-1 at 41) while the City of Spokane reported  
3 that the same CIPP samples “*did not* appear to correlate with Aroclor patterns.”  
4 *See* Haase Decl., Ex. 10 at 279:23–280:16 (emphasis added); *see also* ECF No.  
5 427-2 at 30. Put simply, Rodenburg’s analysis and findings are at odds with the  
6 City’s own conclusions, despite her self-serving statement that “[her] results are in  
7 agreement with those of the authors of [City (2015)].” ECF No. 403-1 at 41.

8 Finally, Plaintiff attempts to paper-over admissions that Rodenburg did not  
9 input raw data accurately, and failed to engage in “sound science”,<sup>4</sup> by claiming  
10 that such errors “had no effect on Dr. Rodenburg’s expert opinions and  
11 conclusions.” ECF No. 496 at 5. Whether Rodenburg’s opinions changed in light  
12 of the numerous scientific shortcomings explored during her deposition is  
13 immaterial. The issue before the Court is whether Rodenburg’s “testimony reflects  
14 scientific knowledge . . . derived by the scientific method” and whether her  
15 opinions are the product of “good science.” *Daubert II*, 43 F.3d at 1315. By her  
16 own admissions, Rodenburg’s opinions do not satisfy the *Daubert* inquiry.  
17 Plaintiff’s post-hoc attempt to rehabilitate Rodenburg is both improper and  
18 unavailing. *Luke v. Family Care & Urgent Med. Clinics*, 323 F. App’x 496, 500

19 <sup>4</sup> Rodenburg admitted that she failed to engage in “sound science” by reporting the  
20 presence of Aroclor PCBs in at least 31 samples which returned negative  
21 coefficients—signifying that no such Aroclors were present. ECF No. 403-1 at  
22 131-70 at (189:18–190:22, 191:10–228:2). Rodenburg also admits that she failed  
23 to accurately input raw data, resulting in a sixteen-fold underestimation of  
24 byproduct PCB concentrations for some data. *Id.* at 194-95 (276:9–277:14).

(9th Cir. 2009) (holding that the district court did not err in excluding plaintiff's untimely expert declarations which "asserted a new theory of causation" and "impermissibly attempted to fix the weakness" identified by the defendants).

**B. Rodenburg Employed an Unreliable Methodology**

The Federal Rules of Evidence and *Daubert* jurisprudence are "safeguard[s] against the menace of unscientific methods and manipulative statistics." *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 76 (3d Cir. 2017). Contrary to principles of good science, Rodenburg engaged in various statistical sleights-of-hand to reach her conclusion that the Spokane River is predominated by Aroclor PCBs. ECF No. 403-1 at 4.

*First*, as Plaintiff concedes, Rodenburg "did not compare samples to byproduct PCB patterns" and instead, "compared sampling data [only] to Aroclor PCB patterns . . . ." ECF No. 496 at 6. Instead of numerically comparing sampling data to Aroclor *and* byproduct PCB patterns—which Rodenburg admits she could have done (ECF No. 403-1 at 108-09 (130:14—131:13)—Rodenburg compared sampling data *only* to Aroclors 1016, 1242, 1248, 1254 and 1260. ECF No. 403-1 at 106, 129-30 (128:8-12, 187:7– 188:11). As a result, her analyses were rigged to undercount the concentration of byproduct PCBs in sampling data in favor of Aroclors. Unsurprisingly, Plaintiff asserts that there "was no undercounting of byproduct PCBs" (ECF No. 496 at 6) without addressing clear admissions that Rodenburg failed to consider numerous congeners, products, and manufacturing processes associated with byproduct PCBs when forming her opinions. ECF No. 402 at 9, 12.

Plaintiff also claims that, by comparing sampling data only to Aroclors,

1 “Rodenburg was following the methodology used by the authors of multiple peer-  
2 reviewed papers.” ECF No. 496 at 6 (citing Exs. 10-12). Exhibits 10-12 neither  
3 sought to identify the presence nor quantify the proportion of byproduct PCB  
4 sources to environmental compartments. *See* ECF No. 505 at 170-200. Because it  
5 was not their objective, the authors of those publications are not incorrect in  
6 evaluating the fit between model output and only Aroclors. *Id.* This does not,  
7 however, excuse Rodenburg from inappropriately applying their methodology to a  
8 different end, namely, the identification of Aroclor *and byproduct sources* of  
9 sampling data. ECF No. 403-1 at 6. Moreover, none of these exhibits report on the  
10 admittedly scientifically indefensible  $R^2$  cutoff values she employed. *Id.*

11 Before being retained as a litigation expert in this case, Rodenburg described  
12 byproduct PCBs as the “main problem” facing the Spokane River during an  
13 academic seminar she presented at Rutgers University. ECF No. 403-1 at 88-89  
14 (72:17–73:20). Recognizing that this presents a tremendous problem for their case,  
15 Plaintiff attempts to quarantine Rodenburg’s statement to the “Spokane County  
16 Regional Water Reclamation Facility.” ECF No. 496 at 2. However, Rodenburg  
17 admitted as she must that both the County and the City Water Reclamation  
18 Facilities discharge to the same River. Haase Decl., Ex. 10 at 75:15–76:6. Further,  
19 Rodenburg attributed this statement to “*one of the cities suing Monsanto*” who can  
20 “try to do a lot of things to remove the Aroclor-type PCBs from their system, but  
21 that’s not their main problem” which is “PCB-11 [from] pigments.” ECF No. 403-  
22 1 at 88-89 (72:17–73:12) (emphasis added). As Plaintiff aptly notes, “Spokane  
23 County is not a plaintiff in this lawsuit . . . .” ECF No. 496 at 2. Nevertheless, and  
24 despite her prior position, Rodenburg purports to testify in this case that PCBs in



1 the Spokane River came from Monsanto, while simultaneously admitting that she  
2 failed to consider numerous byproduct PCB sources. ECF No. 403-1 at 88-89.

3       *Next*, where sampling data did not numerically match an Aroclor,  
4 Rodenburg gave it a second shot at ‘becoming’ an Aroclor by comparing the data  
5 to “what she knew”, subjectively, in her own mind, about byproduct PCBs. ECF  
6 No. 403-1 at 106-08 (128:21–130:18). Further exacerbating the inaccuracy of this  
7 purely subjective approach, Rodenburg mentally considered only those byproduct  
8 PCB congeners found in pigments and silicones—primarily PCBs 11 and 209—  
9 despite admitting that more than 200 manufacturing processes have been identified  
10 as generating byproduct PCBs, and 128 individual congeners have been identified  
11 as byproduct in nature. *Id.*; ECF No. 402 at 9. Rodenburg’s “take my word for it”  
12 approach does not amount to a reliable, verifiable scientific methodology.

13 *Whisnant v. United States*, 2006 WL 2861112, at \*3 (W.D. Wash. Oct. 5, 2006);  
14 *Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1153 (E.D. Wash. 2009).

15       *Third*, to the extent that Rodenburg *did* numerically compare sampling data  
16 to Aroclors 1016, 1242, 1248, 1254 and 1260, she employed a methodology that  
17 admittedly has never been subjected to peer-review, and is scientifically  
18 indefensible. ECF No. 403-1 at 113-19 (135:12–142:2). Plaintiff attempts to  
19 overcome this glaring deficiency by arguing that the  $R^2$  values employed by  
20 Rodenburg were used in a recent peer-reviewed publication, attached as Exhibit 8  
21 to Plaintiff’s opposition. ECF No. 496 at 7. Nowhere in Exhibit 8 does Rodenburg  
22 discuss the use or validity of the  $R^2$  cutoff values employed in this case. ECF No.  
23 503-1 at 646-567. Again, Plaintiff is requesting that the Court impermissibly  
24 accept Rodenburg’s “take my word for it” methodology as true. Plaintiff also fails



1 to address Rodenburg’s admission that she *cannot scientifically disprove* the use of  
2  $R^2$  values contrary to those she employed in her own analyses. ECF No. 403-1 at  
3 115-16 (138:18–139:11).<sup>5</sup> This admission is dispositive of the inquiry, and  
4 demonstrates that her conclusions do not reflect “scientific knowledge” as  
5 mandated by *Daubert*. *Daubert II*, 43 F.3d at 1315.

6 *Fourth*, Plaintiff attempts to separate itself from Rodenburg’s admission that  
7 the analysis used by Burkhard & Weininger (Exhibit 13 to Plaintiff’s opposition) is  
8 “similar to [the] MLR” employed by Rodenburg. ECF No. 403-1 at 117-18  
9 (140:2–141:12). Indeed, Rodenburg claims in her report that the methodology  
10 employed by Burkhard & Weininger—using an  $R^2$  cutoff value of 0.9 to signify  
11 the presence of Aroclors—“has been widely used to determine PCB sources” and  
12 that her own analysis “follows [their] scheme.” ECF No. 403-1 at 10-11  
13 (Rodenburg Rpt.). The first sentence of the Burkhard & Weininger report makes  
14 clear that the COMSTAR analysis they employed is a “*regression analysis*” that  
15 “determines the best combination of the commercial PCB mixtures which best fits  
16 the chromatographic fingerprint of the sample . . . .” ECF No. 506 at 2 (emphasis  
17 added). Thus, Plaintiff’s position that the cutoff values employed by Burkhard and  
18 Weininger “bear no relationship to the  $R^2$  values used [by] Dr. Rosenberg’s [*sic*]”  
19 is disingenuous at best. *See also* ECF No. 403-1 at 172 (237:15-18) (Rodenburg

20 \_\_\_\_\_  
21 <sup>5</sup> That the  $R^2$  cutoff values employed by Rodenburg “were previously used in the  
22 Green-Duwamish River study” (ECF No. 496 at 7) does not render them  
23 scientifically defensible, especially in light of Rodenburg’s admission that she  
24 cannot disprove the use of alternative figures.

1 confirmed that the  $R^2$  values she employed “tell[] you the extent to which that  
2 sample looks like a particular pattern”).

3 *Fifth*, Plaintiff attempts to run away from Rodenburg’s admission that her  
4 interpretation of  $R^2$  values as percentage-weight of Aroclor PCBs is not backed by  
5 any peer-reviewed publication or study. ECF No. 496 at 8; *see also* ECF No. 403-1  
6 at 173 (238:2-14). This is another instance where Plaintiff asks the Court to  
7 impermissibly accept conclusions supported only by something of Rodenburg’s  
8 own creation, that has never been published nor subjected to peer-review. ECF No.  
9 403-1 at 173 (238:2-14); *Henricksen*, 605 F. Supp. 2d at 1153.

10 *Next*, Plaintiff mischaracterizes Monsanto’s position regarding Rodenburg’s  
11 failure to consider alternative PCB sources. Plaintiff begins by claiming that  
12 Rodenburg *did* consider atmospheric deposition as a potential source of PCBs. *See*  
13 ECF No. 496 at 8. Again, Plaintiff’s position is belied by Rodenburg’s sworn  
14 testimony that she did *not* consider the extent to which atmospheric deposition of  
15 PCBs produced in Asia may have impacted the Spokane River watershed. ECF No.  
16 403-1 at 97 (91:3-7). Moreover, Plaintiff’s position that Rodenburg’s “analysis  
17 looks at whether [sampling data] resemble Monsanto’s Aroclors . . . so whether  
18 Rodenburg considered atmospheric deposition of PCBs from Asia is not relevant”  
19 (ECF No. 496 at 8) oversimplifies the inquiry given Rodenburg’s admission that  
20 she *cannot differentiate* between foreign-made PCBs and Aroclors manufactured  
21 by Monsanto. ECF No. 403-1 at 96 (90:2-19).

22 *Finally*, regarding the Inland Empire Paper (“IEP”) facility, Plaintiff  
23 emphasizes Rodenburg’s proffered conclusion that IEP’s effluent “match[es] the  
24 profile of Aroclor 1242 with  $R^2$  values as high as 0.94 when PCB-11 is excluded.”

1 Setting aside the statistical sleight-of-hand in excluding byproduct PCB-11, which  
2 is “ubiquitous in the air worldwide” (ECF No. 421-17 at 10 (38:13-20)) and  
3 “virtually unfound in commercial Aroclors” (ECF No. 421-18 at 6 (26:11-21  
4 (“Rodenburg SD Dep.”))), the fact that Rodenburg found Aroclor 1242 in this  
5 sampling data demonstrates precisely how flawed her methodology is.

6 No party who has *ever* reviewed the effluent at IEP—other than  
7 Rodenburg—has reported the presence of Aroclor PCBs. IEP maintains that it was  
8 a PCB-free mill until it began recycling in 1991, and that PCBs in its effluent  
9 originate from inks in paper its recycles. ECF No. 403-1 at 182. An engineering  
10 firm hired by the SRRTTF similarly reported that “[i]nadvertent PCBs in [IEP’s]  
11 effluent correlated with PCBs in pigments used on the paper products they recycle”  
12 rather than Aroclor PCBs contained in NCR paper. ECF No. 403-1 at 183-84  
13 (258:15–259:10). Moreover, Rodenburg is unaware of *any evidence* that IEP ever  
14 used NCR paper in its recycling processes. *Id.* at 181 (254:2-5). Nevertheless, to  
15 save face in light of the overwhelming weight of evidence demonstrating that  
16 PCBs in IEP’s effluent are byproduct in nature, Rodenburg speculates that NCR  
17 paper must be recycled there to account for the inexplicable presence of Aroclor  
18 1242 that she reports. ECF No. 403-1 at 40. Rodenburg’s position is belied by the  
19 evidence of record concerning IEP’s effluent, and demonstrates her repeated  
20 practice of engaging in statistical manipulations to whittle away evidence contrary  
21 to her proffered conclusions.

### 22 **III. CONCLUSION**

23 For the foregoing reasons, Rodenburg’s opinions should be excluded from  
24 trial under Rule 702.

1 Respectfully submitted this 21st day of February, 2020.

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**CERTIFICATE OF SERVICE**

I certify that on February 21, 2020, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF System which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice.

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